

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

HEALTHIER CHOICE FLOORING,
LLC,

Plaintiff,

v.

CCA GLOBAL PARTNERS, INC.,
CARPET ONE, INC., DALTON
CARPET ONE FLOOR & HOME, and
ETOWAH CARPET ONE FLOOR &
HOME,

Defendants.

Civ. Act. No. 1:11-CV-02504-CAP

PLAINTIFF'S INITIAL DISCLOSURES

Pursuant to Local Rule 26.1 and Fed. R. Civ. P. 26(a)(1), Plaintiff Healthier Choice Flooring, LLC ("Healthier Choice") hereby makes the following initial disclosures. The information herein is provided without any admission of the relevance or admissibility of particular information for any specific purpose.

(1) State precisely the classification of the cause of action being filed, a brief factual outline of the case including plaintiff's contentions as to what defendant did or failed to do, and a succinct statement of the legal issues in the case.

Healthier Choice asserts claims of trademark infringement, unfair competition, trade dress infringement, trademark dilution, and deceptive trade practices. Healthier Choice contends that Defendants CCA Global Partners, Inc., D.C.O, Inc. (d/b/a Dalton Carpet One Floor and Home), and Etowah Decorating Center, Inc. (d/b/a Etowah Carpet One Floor and Home) (collectively, "Carpet One") committed acts that constitute trademark infringement under the Lanham Act (15 U.S.C. § 1114), Georgia law (O.C.G.A. § 10-1-450, *et seq.*), and/or common law; unfair competition and trade dress infringement under the Lanham Act (15 U.S.C. § 1125(a)), Georgia law (O.C.G.A. § 23-2-55), and/or Georgia common law; trademark dilution under the Lanham Act (15 U.S.C. § 1125(c)) and/or Georgia law (O.C.G.A. § 10-1-451(b)); and deceptive trade practices under Georgia law (O.C.G.A. § 10-1-370). Healthier Choice seeks injunctive relief and damages as well as attorneys' fees and litigation expenses.

Healthier Choice markets, sells, and installs padding, cushions, and underlayment (collectively, "underlayment") for various types of flooring, including carpeting. Healthier Choice's products are sold nationwide in many retail stores. Healthier Choice holds a famous registered U.S. Trademark for

HEALTHIER CHOICE[®] for underlayment, and also has common law trademarks for its products. Consumers associate Healthier Choice's brand and other trademarks with high quality products that prevent carpet wear, possess antimicrobial properties, and are environmentally friendly.

Carpet One also sells underlayment.

Healthier Choice and Carpet One attempted for some time to negotiate an agreement for Carpet One to sell Healthier Choice's underlayment, but never entered into a commercial relationship. During negotiations, Healthier Choice provided to Carpet One a substantial amount of materials bearing its trademarks and describing the unique benefits of its underlayment.

Soon after the negotiations ended, and without permission or license from Healthier Choice, Carpet One began to market a "Healthier Living Pad" ("HLP") product as part of its "Healthier Living Flooring Installation System." Without question, the HLP is an underlayment product – although a product manufactured by third parties that lacks the unique qualities of Healthier Choice's underlayment due to design and manufacturing differences. Nevertheless, Carpet One advertises the "Healthier Living Pad" as having the qualities that are unique to the Healthier Choice[®] underlayment products.

Healthier Choice also has other trademarks related to the Healthier Choice[®] carpet underlayment and regularly uses these trademarks and certain phrases in its advertising materials for the Healthier Choice[®] carpet underlayment. Such trademarks and/or phrases used in advertising include:

- Healthier Choice Flooring, LLC;
- “Healthier Choice Carpets & Cushions[®]”;
- “Healthier Choice Carpets & Cushions[®], Inc.”;
- “Healthier Choice Premium Carpet Cushion” line;
- “Moisture Bloc”;
- “2X Double Carpet Warranty” (for a lifetime warranty that “double[s] the texture retention warranty of any brand of residential carpet installed over Healthier Choice carpet cushion”);
- “Protect Your Investment”;
- “Protect Your Family”; and
- Variations of the phrase “Breathe Easier.”

Healthier Choice also includes stylized images in association with some of the trademarks or phrases, such as:

- A stylized image of a house along with the phrase “Healthier Choice Carpets & Cushions[®]”;

- A stylized image of a house along with the phrase “Healthier Choice Carpets & Cushions[®], Inc.”;
- A stylized image of water drops along with “Moisture Bloc”; and
- A stylized image of a shield along with “2X Double Carpet Warranty”.

Carpet One’s marketing and advertising materials for the “Healthier Living Pad” also incorporate exact copies of, or phrases very similar to, Healthier Choice’s trademarks and/or the phrases used in Healthier Choice’s own marketing and advertising materials. Carpet One’s advertising and marketing materials for the “Healthier Living Flooring Installation System” and/or the HLP include the following phrases and/or images:

- “Make the Healthier Choice,” with the words “healthier choice” in a different font and color from other words on the display;
- A stylized image of a house next to the name “Healthier Living Flooring Installation System”;
- “Spill Bloc” and a corresponding stylized image of water droplets;
- “Protect Your Investment and the Health of Your Family”;
- Variations of the phrase “Breathe Easier” in reference to the supposed hypo-allergenic properties;

- An image of a shield;
- “Inhibits the growth of mold, mildew, and odor-causing bacteria”; and
- “Double Warranty on carpet wear and texture retention.”

Healthier Choice has been injured as a result of Carpet One’s misconduct. For example, one customer that had previously sold the Healthier Choice[®] underlayment informed Healthier Choice that it instead began to sell Carpet One’s “Healthier Living Pad” because the “Healthier Living Pad” had the same qualities as Healthier Choice’s underlayment.

Healthier Choice brings this action to stop Carpet One’s infringement, dilution, and unfair competition involving the continued infringement of Healthier Choice’s marks and to obtain damages for harm suffered.

(2) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which plaintiff contends are applicable to this action.

The applicable statutes include 15 U.S.C. §§ 1114, 1116, 1117, 1118, 1125(a), § 1125(c) and O.C.G.A. §§ 10-1-370, *et seq.*, 10-1-373, 10-1-450, 10-1-451(b), 13-6-11, 23-2-55. Georgia common law also will apply. Federal and/or Georgia case law relating to the above-referenced statutes and/or common law with regard to trademark infringement, trade dress infringement, willful trademark infringement, unfair competition, deceptive trade practices, counterfeit marks,

dilution, injunctive relief, delivery and destruction of infringing products, damages, recovery of defendant's profits, treble damages, statutory damages, punitive damages, and attorneys' fees and costs also will apply.

(3) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)

See Attachment A.

(4) Provide the name of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. For all experts described in Fed. R. Civ. P. 26(a)(2)(B), provide a separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Responses to Initial Disclosures as Attachment B.)

At this time, Healthier Choice has not identified any expert witness(es) for use at trial. Healthier Choice reserves the right to supplement this response as discovery continues.

Pursuant to the Court's Scheduling Order, [D.I. 17], Healthier Choice will submit expert reports on issues for which it bears the burden of proof on or before March 2, 2012, and Healthier Choice will submit expert reports on issues for which it does not bear the burden of proof on or before April 13, 2012.

(5) Provide a copy of, or a description by category and location of, all documents, data compilations or other electronically stored information, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the

subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)

See Attachment C.

(6) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of, or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying as under Fed. R. Civ. P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)

Healthier Choice seeks the following monetary damages:

- Carpet One's profits obtained from all sales of the "Healthier Living Flooring Installation System" and the HLP;
- Recovery of Healthier Choice's lost profits due to sales of the "Healthier Living Flooring Installation System" and the HLP;
- Other damages suffered by Healthier Choice that may be identified through discovery;
- Treble damages, or any other amount exceeding the actual damages as determined by this Court's judgment;
- Such amount above recovery of profits as this court sees fit;
- Attorneys' fees and costs of this action;
- Statutory damages permitted pursuant to 15 U.S.C. § 1117(c);

- Liquidated damages permitted pursuant to O.C.G.A § 10-1-450;
and/or
- Punitive damages.

Healthier Choice will be able to compute a more exact amount of damages upon further discovery. Healthier Choice reserves the right to supplement this response.

(7) Attach for inspection and copying as under Fed. R. Civ. P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment. (Attach copy of insurance agreement to Initial Disclosures as Attachment E.)

Not applicable.

(8) Disclose the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in the cause of action set forth in plaintiff's cause of action and state the basis and extent of such interest.

Not applicable.

Date: December 16, 2011

/s/ Meghan M. Rachford
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*Attorneys for Plaintiff Healthier Choice
Flooring, LLC*

ATTACHMENT A

At this time, Healthier Choice believes that the following individuals may have discoverable information, which Healthier Choice may rely on to support its claims or defenses in the above-captioned litigation. The address and telephone number provided for each individual is provided to the best of Healthier Choice's knowledge. Healthier Choice reserves the right to supplement this response as discovery continues.

Craig Poteet
c/o Healthier Choice Flooring, LLC
401 Jones Street
Dalton, GA 30720-3464
706-275-0345

Sandy Mishkin
c/o CCA Global Partners, Inc.
4301 Earth City Expressway
Earth City, MO 63045
800-466-6984

Carl Poteet
c/o Healthier Choice Flooring, LLC
401 Jones Street
Dalton, GA 30720-3464
706-275-0345

ATTACHMENT B

At this time, Healthier Choice has not yet identified any expert witness(es) for use at trial. Healthier Choice reserves the right to supplement this response as discovery continues.

ATTACHMENT C

Based upon presently available information, Healthier Choice believes it may use the following categories of documents, data compilations, electronically stored information, and tangible things in its possession, custody, and control to support its claims or defenses in this case:

- Healthier Choice's marketing and advertising materials used in connection with the HEALTHIER CHOICE[®] carpet underlayment.
- Manufacturing specifications for the HEALTHIER CHOICE[®] carpet underlayment product.
- Documents relating to the qualities of the HEALTHIER CHOICE[®] carpet underlayment product, including but not limited to antimicrobial properties, resistance to wear and tear, moisture resistance, impact on breathing, resistance to mold, resistance to mildew, and/or resistance to bacteria.
- Marketing and advertising materials used by Carpet One to market and/or advertise the "Healthier Living Flooring Installation System" and/or HLP.
- Communications (and related documents) relating to a proposed commercial relationship between Carpet One and Healthier Choice relating to the HEALTHIER CHOICE[®] carpet underlayment.

- Documents provided to Carpet One by Healthier Choice with regard to a proposed commercial relationship relating to the HEALTHIER CHOICE[®] carpet underlayment.
- Documents or communications relating to actual confusion between the HEALTHIER CHOICE[®] carpet underlayment and Carpet One's "Healthier Living Flooring Installation System" and/or HLP by Healthier Choice's actual or potential customers.
- Documents or communications relating to the HEALTHIER CHOICE[®] trademark, Healthier Choice's other trademarks, and/or phrases used in Healthier Choice's marketing and advertising materials for the HEALTHIER CHOICE[®] carpet underlayment.

Such documents, data compilations, electronically stored information, and tangible things in its possession, custody, and control are located at Healthier Choice's office, which is located at 401 Jones Street, Dalton, GA 30720-3464. Healthier Choice reserves the right to supplement this response as discovery continues.

ATTACHMENT D

Based upon presently available information, Healthier Choice believes it may use the following categories of documents or electronically stored information as a basis for its computation of damages:

- Documents relating to sales, pricing, costs, profits, and orders for the HEALTHIER CHOICE[®] carpet underlayment product.
- Documents relating to Carpet One's sales or offers for sale of the "Healthier Living Flooring Installation System" and/or the HLP that reflect purchase price, any adjustments to purchase price, fixed and variable costs associated with the purchase, and other factors considered by Carpet One when calculating net and gross profits.
- Documents sufficient to show other damages Healthier Choice suffered as a direct result of Carpet One's actions relating to the "Healthier Living Flooring Installation System" and/or the HLP.
- Receipts of costs incurred to litigate this action.
- Copies of bills from Healthier Choice's attorney reflecting the amount of time billed in litigating this action.

Such documents or electronically stored information are located at Healthier Choice's office located at 401 Jones Street, Dalton, GA 30720-3464. Healthier Choice reserves the right to supplement this response as discovery continues.

ATTACHMENT E

Not applicable.

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to L.R. 7.1, N.D. Ga., that the foregoing PLAINTIFF'S INITIAL DISCLOSURES was prepared in accordance with L.R. 5.1, N.D. Ga. using Times New Roman font, 14 point.

/s/ Meghan M. Rachford
Meghan M. Rachford
Georgia Bar No. 766229

CERTIFICATE OF SERVICE

A copy of this document was filed with the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This 16th day of December, 2011.

/s/ Meghan M. Rachford
Meghan M. Rachford
Georgia Bar No. 766229